

83-122-I

THE STATE OF NEW HAMPSHIRE

ATTORNEY GENERAL
GREGORY H. SMITH

DEPUTY ATTORNEY GENERAL
PETER W. MOSSEAU

ASSISTANT ATTORNEYS GENERAL
JOHN T. PAPPAS
MARC R. SCHEER
DONALD J. PERRAULT
MARTIN R. JENKINS
BETSY S. WESTGATE
EDWARD L. CROSS, JR.
PETER C. SCOTT
MICHAEL A. PIGNATELLI
BRIAN T. TUCKER
PAUL BARBADORO
BRUCE E. MOHL
JOHN A. MALMBERG
DOUGLAS L. PATCH
LORETTA S. PLATT
ROBERT P. CHENEY, JR.



THE ATTORNEY GENERAL
STATE HOUSE ANNEX
25 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

ASSISTANT ATTORNEYS GENERAL
LESLIE J. LUDTKE
ANDREW L. ISAAC
RONALD F. RODGERS
G. DANA BISBEE
PETER T. FOLEY
STEVEN M. HOURAN
JEFFREY R. HOWARD
EVE H. OYER
GREGORY W. SWOPE
JAMES D. CAHILL, III
CHARLES W. GRAU
DANIEL J. MULLEN
T. DAVID FLOURDE

ATTORNEYS
EDNA M. CONWAY
AMY L. IGNATIUS
ROBERT B. MUH
DAVID K. MULHERN
JAMES A. SWEENEY

March 12, 1984

William T. Wallace, Jr., MD, MPH
Director
Division of Public Health Services
Department of Health and Welfare
Hazen Drive
Concord, NH 03301

Dear Dr. Wallace:

You have requested our opinion on whether certain information reported to the Division of Public Health Services about cases of Acquired Immune Deficiency Syndrome (AIDS) must be made available for review by the public. Specifically, you have asked whether the following data in reported AIDS cases is subject to the public inspection provision of the Right to Know Law, RSA 91-A:4:

1. Name and residence of confirmed cases.
2. Hospital where treated or disease discovered.
3. Treating physician.
4. Details about the lifestyle or background of victims.

For the following reasons, our response is that information which would identify an individual with a confirmed case of AIDS is not subject to RSA 91-A:4, and therefore should not be made available for inspection by the public.

Although RSA 91-A, commonly referred to as the Right to Know Law, provides no definition of public record, the Supreme Court has stated that the scope and application of the statute are to be broadly construed. Thayer v. State Tax Commission, 114 N.H.



533 (1973). The information which is the subject of your request is contained in records compiled by the Division of Public Health which are used to calculate state health statistics. It is, therefore, our opinion that such records are public records for purposes of RSA Chapter 91-A. For the following reasons, however, we believe that these records are not subject to the public inspection requirements of RSA 91-A:4.

The legislature has specifically recognized that certain records should not be made available for public inspection. The following records have been specifically exempted from the disclosure requirements imposed by RSA 91-A:4:

- I. Grand and petit juries.
- II. Parole and pardon boards.
- III. Personal school records of pupils.
- IV. Records pertaining to internal personnel practices, confidential, commercial, or financial information, personnel, medical, welfare, and other files whose disclosure would constitute invasion of privacy. (RSA 91-A:5).

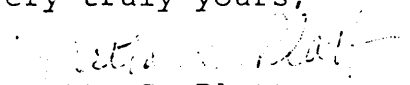
In determining whether the information requested is exempt as medical information or confidential information, the benefits of disclosure to the public are to be balanced against the benefit of nondisclosure to the public body. Mans v. Lebanon School Board, 112 N.H. 160 (1972). For the following reasons, we believe that the release of information identifying an individual with a confirmed case of AIDS is exempted under RSA 91-A:5. First, the information reported is of a medical nature. The purpose of the reporting statute is health-oriented, that is, to prevent the spread of disease. Moreover, the AIDS victim and his treating physician have no discretion under the reporting requirement imposed by statute. RSA 141:1. To allow members of the public to obtain access to otherwise confidential medical information would require an AIDS victim to decide between accepting treatment and the resulting public disclosure of his condition or to forego treatment to retain his privacy. Second, the legislature, recognizing the importance of full disclosure between a doctor and patient, has established a physician-patient privilege which should not be waived, unless such disclosure is considered essential. RSA 329:26; State v. Kupchun, 117 N.H. 412 (1977). In Kupchun, the Court limited an implied statutory waiver of the privilege to court proceedings and specifically prohibited public disclosure of information acquired pursuant to the statutory waiver. Similarly, we believe that the obligatory reporting requirements contained in RSA Chapter 141 should not result in a complete waiver of the physician-patient privilege established in RSA

329:26.¹ Thus, any information reported thereunder should not be made available for public disclosure. Finally, given the controversy surrounding AIDS and the lack of understanding of its cause or causes, it may be said that disclosure of the identity of an AIDS victim is an intimate detail which might conceivably "harm the individual." See Mans v. Lebanon School Board, 112 N.H. 160 (1972) (citations omitted).

The purpose of RSA Chapter 91-A, is to "ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people." In this case, however, the Division of Public Health is compiling statistics; that is, engaging in a specific function established by the legislature which involves neither discretion nor decision-making by state officials. It is not a case, therefore, where official state actions or policy must be subject to public disclosure. Accordingly, we conclude that information which would identify an individual with a confirmed case of AIDS should not be made available for inspection by the public under RSA 91-A:4.

We are currently reviewing your request as it pertains to death certificates and expect that a response will be forthcoming in the near future. Should you have any additional questions, please feel free to contact me.

Very truly yours,


Loretta S. Platt
Assistant Attorney General
Division of Legal Counsel

LSP/gla

83-122-I

¹ We note that RSA Chapter 141-A, entitled "Critical Health Problems Reporting Act", specifically exempts the identity of an individual reported thereunder from disclosure under RSA Chapter 91-A. RSA 141-A:5, III (Supp. 1983).